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No. 73—1179

In the Supreme Court of the United States

OCTOBER TERM, 1973

ENVIRONMENTAL DEFENSE FUND, INC., ET AL.,
PETITIONERS

v.

GILBERT STAMM, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
WALLACE H. JOHNSON,
Assistant Attorney General,
EDMUND B. CLARK,
GEORGE R. HYDE,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. D) is reported at 487 F. 2d 814. Two of the opinions of the United States District Court for the Northern District of California (Pet. App. A, C) are reported at 352 F. Supp. 50; 356 F. Supp. 131. The other opinion of the district court (Pet. App. B) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on November 9, 1973. The petition for a writ of certiorari was filed on February 1, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the courts below correctly determined that the environmental impact statement in this case, as supplemented, was adequate.

2. Whether the trial court properly deferred consideration of the effect of the California State Water Resources Board's decision pending the outcome of separate litigation of whether the State Board's decision is binding upon the federal defendants and the operation of the congressionally authorized project.

STATEMENT

Petitioners seek to enjoin further work being done on the public works project, known as the New Melones Dam, on the Stanislaus River in California. This dam was originally authorized by Congress under the Flood Control Act of 1944, and reauthorized under the Flood Control Act of 1962, 76 Stat. 1180, as a multi-purpose project for flood control, irrigation, fish and wildlife enhancement, power generating and water quality control. A diversion tunnel, a 25 million dollar project, had been substantially completed prior to the petitioners' instituting this action seeking to enjoin the awarding of the main construction contract.

The dam as authorized is to be constructed by the Corps of Engineers and operated by the Bureau of Reclamation of the United States Department of the Interior. After the enactment of the National Environmental Policy Act of 1969, 42 U.S.C. 4321, *et seq.* (NEPA), an environmental impact statement (EIS) was prepared, circulated for comment and filed with the Council on Environmental Quality.

Petitioners brought an action challenging the adequacy of the EIS. A hearing on the petitioners' motion for a preliminary injunction and the trial on the merits were consolidated and tried. In its first opinion (Pet. App. A; 352 F. Supp. 50) the district court denied the petitioners' request for a preliminary injunction and found the EIS's discussion of the uses of the major portion of the water to be impounded by the dam to be adequate, but ordered the preparation of a supplemental EIS as to the "conservation yield" which would be available in eight to ten years. The EIS as originally prepared had not covered the "conservation yield" due to the fact that this water would not become available for a period of from three to ten years after the completion of the dam, depending upon precipitation. The federal officials therefore had proposed to file a separate EIS dealing with this "conservation yield" at a time nearer to the dam's actual operation and the water's availability. The district court concluded, however, that where the ultimate operation of a project is still in doubt at the time the EIS must be filed, a tentative discussion or "best estimate" is nonetheless required. The court also directed that prior to actual use, a revised or supplemental statement should be filed. After a supplemental EIS was prepared the court held a hearing as to the adequacy of the supplemental EIS and concluded that the EIS, as revised, "* * * complies fully with the requirements of NEPA" (Pet. App. C; 356 F. Supp. 139–140). The district court further held that it would be inappropriate to enjoin the entire project pending a decision of the State Water Resources

Control Board. Finally the court retained jurisdiction to insure that a final EIS would be filed prior to operation of the project.

At petitioners' request the court of appeals stayed the awarding of the contract for the dam structure pending its decision in this case,[1] but expedited the briefing and argument of the appeal. On the merits the court of appeals (Pet. App. D) affirmed the decisions of the district court, holding that it would be improvident for the federal officials to make a priority commitment now as to the conservation yield because the waters would not be available for at least eight years and that the retention of jurisdiction by the district court throughout the project's development provided sufficient protection for all parties. The court stated that "The EIS as revised has been reviewed on appeal and we agree with the judgment of the District Court as to its adequacy under NEPA requirements, as measured by 5 U.S.C. § 706(2)(A)" (Pet. App. D; 487 F. 2d 817).

ARGUMENT

1. The determination by the court of appeals that the EIS, as supplemented, fully complies with the provisions of NEPA is based upon its careful review of the substantial record made in the district court proceedings.

[1] The parties stipulated that the approximate increase in costs should the project be delayed six months would amount to 12.6 million dollars (Pet. App. A; 352 F. Supp. at 60). As a result of this litigation the construction season was lost, the contractor withdrew his bid and the project has been readvertised and bids have been opened.

The appellate court concluded that (Pet. App. D; 487 F. 2d 821–822):

> The District Court has twice examined the adequacy of the EIS assuming optimum operating conditions as projected by the authorizing agency and has held that it is adequate as revised and supplemented. We have examined those proceedings carefully and agree with the District Court. The NEPA has served its purpose. It has stimulated a full examination of all objections, adverse consequences, alternatives and, with the decision of the SWRCB, possible operational limitations. It now becomes a question of project justification in the light of all known and possible consequences. Future changes which may have a significant effect upon the environment, not heretofore examined, may be brought to the attention of the District Court under its reserved jurisdiction.
>
> We affirm the judgments of the District Court and vacate all orders granting injunctions by this court.

With respect to petitioners' suggestion (Br. 16) that the EIS is inadequate because it fails to evaluate precisely the need for the irrigation potential of the dam, we invite the Court's attention to the supplemental EIS which to the extent possible covers this matter. Since this water will only become available in eight to ten years, the discussion is necessarily a "best estimate." It is the government's intention to file an additional EIS nearer in time to the obtaining of the water, which will be based on current data. However, the supplemental EIS, required by the district court, considered this factor to the fullest extent

possible. This supplemental EIS has been examined by the courts below and determined to be adequate. In addition, the district court has required that an additional EIS be prepared prior to operation of this project and retained jurisdiction to insure compliance. As the court of appeals pointed out in *Jicarilla Apache Tribe of Indians* v. *Morton*, 471 F. 2d 1275, 1280 (C.A. 9):

> If we were to impose a requirement that an impact statement can never be prepared until all relevant environmental effects were known, it is doubtful that any project could ever be initiated.

2. The standard of review utilized by the courts below was proper. The district court conducted full evidentiary hearings and heard testimony of "the administrative officials who participated in the decision * * * explaining their action." *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 420. After extensive hearings on the alleged deficiencies of the EIS, the district court ordered the EIS supplemented in part, and then determined that, as revised, the EIS was adequate. The court of appeals stated that it had carefully examined those proceedings and agreed with the district court.

There is no real conflict among the circuits as to the applicable standards for review of the contents of an EIS. The courts of appeals have consistently held that judicial review of the "substantive" agency decision, if available at all, is governed by the "arbitrary" and "capricious" standard of 5 U.S.C. 706(2)(A). *E.g.*,

Jicarilla Apache Tribe of Indians v. *Morton*, 471 F. 2d 1275, 1281 (C.A. 9); *Calvert Cliffs' Coordinating Committee, Inc.* v. *United States Atomic Energy Commission*, 449 F. 2d 1109, 1115 (C.A.D.C.); *Save Our Ten Acres* v. *Kreger*, 472 F. 2d 463, 465–466 (C.A. 5).

By contrast, the adequacy of the contents of impact statements has been more closely reviewed by the courts, under a standard of "reasonableness." *E.g.*, *Natural Resources Defense Council, Inc.* v. *Morton*, 458 F. 2d 827, 834 (C.A.D.C.); *National Helium Corporation* v. *Morton*, 486 F. 2d 995 (C.A. 10).

While there has been some debate in the Ninth Circuit as to the applicable standard, that Circuit appears now to be in conformance with other Circuits. In *Life of the Land* v. *Brinegar*, 485 F. 2d 460, certiorari denied, No. 73–1088, April 22, 1974, and in the opinion below, panels of the Ninth Circuit spoke of applying the "arbitrary" and "capricious" standard of 5 U.S.C. 706 (2)(A) to the review of the contents of an EIS. However, in *Lathan* v. *Volpe*, Nos. 72–2932 and 72–2974, decided December 7, 1973, a different panel of the Ninth Circuit more recently pointed out that this formulation was mistaken (slip op. p. 4):

> [5 U.S.C. 706] subsection (2)(D) provides that we may set aside agency action if we find it to be without observance of procedure required by law. We regard the question whether an Environmental Impact Statement complies with the requirements of NEPA as a procedural question, governed by § 706(2)(D). See *Jica-*

> *rilla Apache Tribe, supra,* 471 F. 2d at 1280–1. In *Life of the Land* v. *Brinegar,* 9 Cir., 1973, * * * we quoted *Jicarilla Apache Tribe, supra,* regarding substantive decisions, but then apparently applied § 706(2)(A) to the question whether the EIS satisfied the requirements of NEPA. This appears to be a misreading of *Jicarilla Apache Tribe,* but our reading of *Life of the Land* convinces us that the result would be no different if we had thought that § 706(2)(D) applied.

The *Lathan* formulation, which we believe to be in conformity with the law of other circuits, supports the holding below, for the court of appeals held that the district court's opinion could be supported under either standard. After opting for 5 U.S.C. 706(2)(A) as the proper standard, the court below specifically stated (Pet. App. D; 487 F. 2d 817, n. 7):

> *But see Jicarilla Apache Tribe of Indians,* 471 F. 2d 1275, 1280 (9th Cir. 1973), which uses 5 U.S.C. § 706(2)(D) as the appropriate standard, permitting appellate review of findings and conclusions found to be "without observance of procedure required by law." Under the circumstances of this case, either test would lead to the same result.

Whatever the articulated standard, the courts—including the panel below—have reviewed impact statements in essentially the same way. The claims of alleged non-compliance with NEPA have been measured against the agency's record (the EIS) and the evidence adduced at trial. Here, the petitioners were given an opportunity in extensive hearings before the district court to show why the EIS was inadequate.

It is difficult to conceive how a more detailed review could be made. An examination of the district court's opinions demonstrates that petitioners' complaint, directed to the court's choice of words, is really based upon their dissatisfaction with the results.

3. The State Water Resources Control Board's decision is not relevant to this case. There is pending now in *United States* v. *State of California State Water Resources Control Board, et al.*, Civil No. S–3014, Eastern District of California, a case which will determine whether this federally authorized project is to be subject to the control of the California State Water Resources Control Board. The federal defendants have taken the position that the peculiarities of state law or regulations in the use of federally authorized projects are of no effect. See *Ivanhoe Irrig. Dist.* v. *McCracken*, 357 U.S. 275; *City of Fresno* v. *California*, 372 U.S. 627. In any event, even if the State Board's decision is found to be binding on the federal agencies, its only effect would be to defer slightly the beneficial use of the full conservation yield of the project. Most of the project purposes were permitted by the Board's decision. The decision does not render the project useless or fundamentally alter its value.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.
WALLACE H. JOHNSON,
Assistant Attorney General.
EDMUND B. CLARK,
GEORGE R. HYDE,
Attorneys.

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